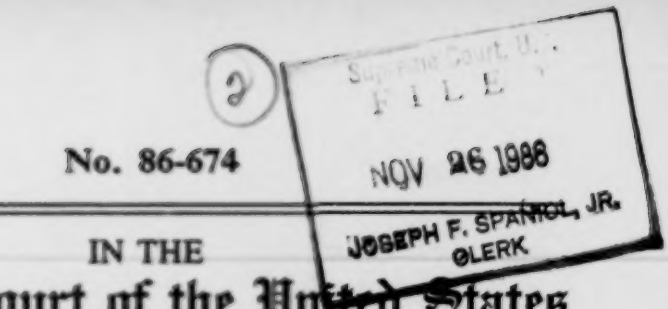

No. 86-674

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOAN S. TOZER, KATHERINE S. TOZER, LINDSAY M. TOZER,

Petitioners,

v.

LTV CORPORATION, JONES & LAUGHLIN INDUSTRIES, INC., VOUGHT CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The respondents accept the petitioners' account of the proceedings below.

STATEMENT OF THE CASE

On August 28, 1980, Lt. Commander Eliot Tozer was killed while on active duty when a United States Navy RF-8 reconnaissance aircraft crashed off the coast of California, after being launched from the aircraft carrier, U.S.S. Kitty Hawk. The aircraft was executing a low altitude, high speed fly-by off the carrier when the incident occurred. Plaintiffs

sought relief against the defendants at trial, under the Death On The High Seas Act (DOHSA), 46 U.S.C. §§ 761-768 (1920), and General Maritime Law, alleging a defect in the design of a modification to the aircraft.

The subject of the alleged defective modification was an access panel known as the "Buick Hood". Pursuant to a contract with the United States Navy, the Buick Hood had been modified by the defendants. It was plaintiff's contention that the Buick Hood came loose during the flight, causing the aircraft to lose control and ultimately crash. The jury returned a verdict in favor of plaintiffs on theories of negligence and strict liability for the design of the subject modification.

Defendants contended at trial that the government contractor defense barred plaintiff's claims for damages. The jury was instructed as to the four elements necessary to establish the government contractor defense as set forth in *McKay v. Rockwell International Corp.*, 704 F 2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

The jury was instructed that two of those elements were uncontested: namely, that the United States was immune from any claim by the plaintiffs, and, second, that the Buick Hood conformed to its designed specifications. The jury then found that the U.S. Navy did review and approve reasonably precise specifications for the Buick Hood modification. Further, the jury concluded that defendants did not fail to notify the Navy about any dangers in the design which were known to defendants, but not to the Navy. Thus all four elements of the government contractor defense were established by defendants.

The court, however, instructed the jury that the government contractor defense only applied to plaintiff's strict liability cause of action and would not bar plaintiff's

negligence claim. Thus, despite defendant's objection to such a limitation, a plaintiff's verdict was rendered on the negligence cause of action.

On appeal, the Fourth Circuit reversed the lower court's decision based on a separation of powers theory, and held that the government contractor defense, if proven, properly operates to preclude both negligence and strict liability claims.

SUMMARY OF ARGUMENT

Although petitioners argue that the decision of the Fourth Circuit in this case is in conflict with decisions from the Third, Fifth, Seventh, Ninth and Eleventh Circuits on the issue of the application of the government contractor defense, such conflict is illusory in that regardless of the formulation of the defense enumerated by the Circuits, they are all calculated to reach the same ultimate conclusion. Further, there is no question among the Circuits that the Government contractor defense applies equally to both negligence and strict liability claims.

Moreover, even if it should be determined that there exists a variance among the Circuits in legal interpretation and application of the defense, the instant case is not an appropriate case to help reconcile this conflict as the outcome of the case will remain the same regardless of the interpretation of the defense applied to the facts of this case. It is therefore respectfully submitted that the instant case is inappropriate for review by this Court.

ARGUMENT

I. INTRODUCTION

The decision below, holding that the government contractor defense is equally applicable to both negligence and strict liability claims is correct, as is the court's determination that the defendants herein are immune from liability under the defense. There is no real conflict between this holding and those rendered by other Circuit Courts of Appeal. Nor is there any other basis for further review of the instant case by this Court.

It is petitioners' contention that present judicial positions concerning the government contractor defense are so diverse and uncertain that review by this Court is necessary to resolve the confusion among the Circuits. However, a closer reading of recent decisions regarding this defense reveals that the Fourth Circuit's decision in the instant case is not inconsistent with what has been decided in other cases involving the government contractor defense.

II. CERTIORARI IS NOT APPROPRIATE IN THE INSTANT CASE AS REGARDLESS OF THE CIRCUIT DECISION APPLIED TO THE INSTANT CASE THE OUTCOME WILL REMAIN THE SAME, THUS, ANY ALLEGED CONFLICT BETWEEN THE DECISION IN THE INSTANT CASE AND OTHER CIRCUIT COURTS OF APPEAL IS ILLUSORY.

Petitioner's principal argument in support of their writ is that the decision in the instant case is in direct conflict with *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir.

1985). It is petitioners' contention that the Eleventh Circuit in *Shaw* rejected the approach to the government contractor defense as set forth in *McKay*, 704 F.2d at 451, and held the manufacturer liable for its negligence in failing to fulfill its duty of due care in the design of a modification of an A-6 bomber aircraft, despite the fact that the Navy may have approved the precise specification for purchase.

Although it is true that the test formulated by the court in *Shaw* is different from the elements of the government contractor defense as stated in *McKay*, both tests are reasonably calculated to produce the same result, namely, to determine responsibility for the defective design. In fact, in reaching its decision for plaintiff, the lower court in *Shaw* applied the government contractor defense as set forth by the court in *McKay*, but found that defendant did not prove the elements of the defense, thereby reaching the same result ultimately reached by the Eleventh Circuit on appeal

In fashioning its interpretation of the government contractor defense, the Eleventh Circuit Court in *Shaw* expressed its central concern as being whether the United States had actually made an informed decision to use a particular military product despite knowledge of the inherent risks to servicemen. The court further held that the government contractor defense "is available in certain situations not because a contractor is appropriately held to a reduced standard of care, nor because it is cloaked with sovereign immunity, but because traditional separation of powers doctrine compels the defense." *Shaw*, 778 F.2d at 740. In emphasizing this point, the court quoted Judge Pratt in *In Re "Agent Orange" Product Liability Litigation*, 534 F.Supp. 1046, 1054 n.1 (E.D.N.Y. 1982) as follows:

> The purpose of a government contract defense . . . is to permit the government to wage war in

> whatever manner the government deems advisable, and to do so with the support of suppliers of military weapons. Considerations of cost, time of production, risks to participants, risks to third parties, and any other factors that might weigh on the decisions of whether, when, and how to use a particular weapon, are uniquely questions for the military and are exempt from review by civilian courts.

Shaw, 778 F.2d at 740.

The court then added that "the purpose of such a defense is not only to permit the government actually to 'wage war', but also to prepare for war. . . ." *Id.* Thus, the court recognized a government contractor defense based on the rationale that the constitutional separation of powers requires the judiciary to defer to military decisions to use a weapon designed by an independent contractor, despite its risks to servicemen.

Therefore, as stated, the court held that the proper question for the court to determine was whether such a decision had actually been made by the military. This rationale and formulation of the central inquiry behind the defense is precisely the same as that applied in the instant case.

Like *Shaw*, the Fourth Circuit Court in the instant case recognized that application of the defense to military contractors requires the consideration of separation of powers. Further, the Fourth Circuit in the instant case stated:

> [E]ven apart from matters of constitutional text, the reservation of judicial judgment on strictly military matters is sound policy. The judicial branch contains no Department of Defense or

> Armed Services Committee or other ongoing fund of expertise on which its personnel may draw. Nor is it seemly that a democracy's most serious decisions, those providing for common survival and defense, be made by its least accountable branch of government.

Tozer v. L.T.V. Corp., 792 F.2d 403, 405 (4th Cir. 1986). Thus, it is readily apparent that both the Fourth and Eleventh Circuits agree that decisions concerning defense questions made by the military should be accorded the utmost of deference by the judiciary system. It is also clear that the government contractor defense as set forth by the Fourth and Eleventh Circuit seeks to provide immunity to government contractors only for *decisions concerning design specifications and modifications actually made by the military.*

In the instant case, the Fourth Circuit Court held the supplier of military equipment immune from a liability where:

> 1) The United States is immune from liability under *Feres* and *Stencel*, 2) the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment, 3) the equipment conformed to those specifications, and 4) the supplier warned the United States about patent errors in the government's specifications or about the dangers involved in the use of the equipment that were known to the supplier but not to the United States.

Id. at 408 (quoting *McKay*, 704 F.2d at 451).

At trial, the jury found that all elements of the defense were met by defendant, but the jury was instructed by the

lower court that the defense was only properly applied to plaintiff's strict liability claim. Subsequently, the Fourth Circuit Court ruled that the defense was equally applicable to plaintiff's negligence claim.

In *Shaw*, plaintiff's asserted claims of strict liability, negligence and breach of warranty. The lower court therein found that defendants had not met the elements of the defense as set forth in *McKay* and followed in *Tozer*. On appeal, the Eleventh Circuit held:

> As a general rule, the military contractor will be liable, as is any other contractor, to servicemen injured by defects. . . . [A] contractor may escape liability if it affirmatively proves: (1) that it did not participate or participated only minimally in the design of those products or parts of products shown to be defective; *or* (2) that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor, *and* that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design.

Shaw, 778 F.2d, at 746. (Emphasis original).

The court then went on to explain element 2 of the defense, stating:

> Reasonable knowledge is *not* synonymous with omniscience. A risk is reasonably known when it is either actually known, or reasonably ought to be known given good design practice in the industry.

Id.

Finally, in its interpretation of the defense the Eleventh Circuit made no distinction in the application of the defense

to claims of strict liability, negligence or breach of warranty.

After articulating its version of the government contractor defense, the Eleventh Circuit Court in *Shaw* proceeded to apply it to the facts of the case before it. In going so, the appellate court relied on the finding of the trial court that the defendant was responsible for the design alteration. Thus, the court continued on in order to determine if the second element of the test had been met, stating:

> Element two provides that a military contractor may still defend itself against liability if it timely informed the military of the design risks and alternatives *reasonably known to it*, and if the military, so warned, clearly authorized the contractor to proceed.

Shaw, 778 F.2d at 747. (Emphasis added.)

Once again, the court relied on the finding of the trial court holding that the defendant knew of the defect and failed to warn the Navy. The trial court further noted that the defendant was both actually aware and reasonably should have been aware, given good design practice, of the risk involved in the design, and the Navy did not have sufficient expertise to render a warning of that risk unnecessary.

Thus, although the Eleventh Circuit redesigned the elements necessary to establish the defense, it is clear that the basis for holding the defendant liable was in fact no different than that applied by the trial court in *Shaw*: namely, that the defendant was unable to meet the elements of the *McKay* defense. Therefore, the Eleventh Circuit's conclusion that the Navy's approval of the specifications and design changes did not constitute the sort of informed military decision to accept the risk of a dangerous product

to which this court must defer under the separation of powers doctrine, would have been reached irrespective of the formulation of the defense followed.

That the two tests in reality reach the same final conclusion was also noted in the recent decision of *Trevino v. General Dynamics Corp.*, 626 F.Supp. 1330 (E.D.Tx. 1986). In that case, survivors of five Navy divers who died from vacuum-induced bends while in a submarine's hangar diving system sued the military contractor who designed the system. The defendants therein argued that the government contractors defense protected them from any liability to the plaintiffs. In holding the defendants liable to plaintiffs for their negligence, the *Trevino* court applied the four-prong test set forth in *McKay* and followed by numerous other Circuit Court decisions. *Bynum v. F.M.C. Corp.*, 770 F.2d 556 (5th Cir. 1985); *Tillett v. J. I. Case Co.*, 756 F.2d 591 (7th Cir. 1985); *Koutsoubos v. Boeing-Vertol*, 755 F.2d 352 (3d Cir.), *cert denied*, ___ U.S. ___, 106 S.Ct. 72 (1986).

However, in applying the test, the court found that it was the defendants and not the Navy that "established reasonably precise specifications" for the diving system, and further, that defendants failed to warn the Navy of the danger of design deficiencies in the Navy's general requirements. Accordingly, the court held the government contractor defense would not shield defendants from liability.

Subsequent to the time this order was prepared, but prior to filing, the Eleventh Circuit handed down its decision in *Shaw*. Although the *Trevino* court recognized that *Shaw* set forth a different set of guidelines to establish the government contractor defense, it elected not to change its holding as both tests were "reasonably calculated to produce the same result: to place liability upon the party

ultimately responsible for the defect." *Trevino*, 626 F.Supp. at 1344. In further support of the determination that the two tests ultimately reached the same final conclusion, the court in *Trevino* stated "*nothing in the Judge Johnson (Shaw) decision is inconsistent with what has been done in this case.* Here, no such informed decision was made by the United States Navy. . . . [L]iability has been fairly placed upon the party 'ultimately responsible for the design defect' ". *Id.* (Emphasis added).

Such would also be the result in the instant case, as it is clear that the objective and ultimate outcome in applying the two tests is the same. First, there can be no question that the modificatin of an RF-8 reconnaissance aircraft invokes a separation of powers question required under *Shaw*, just as the modification of an aircraft in the *Shaw* case was clearly part of a "weapons system".

Secondly, the ultimate result sought under both formulations of the test, namely, to determine the party responsible for the design defect, will also not change. The conclusion that the Navy was responsible for the defect in the design modification must remain the same under the application of either test. This is the only possible determination as the jury in the lower court action found that the Navy required defendants to design a modification to the aircraft, and said modification involved continual back-and-forth discussion between defendants and the Navy, and finally, the Navy exercised final authority over the design of the Buick Hood. Also, the jury specifically found that the contractor did not fail to notify the Navy of any danger created by the modifications which were known to defendants but unknown to the Navy. Thus, as it has been unequivocally held that defendants were not "ultimately responsible for the design defect", it is clear that there is no

real conflict between the decisions reached by the Eleventh and Fourth Circuit.

Further, even if it were to be determined that there exists a conflict between the various forms of the government contractor defense, review of the instant case is unnecessary as the same outcome would result, regardless of the form of the defense applied.

As the jury at the trial below held that defendants had established compliance with all four elements of the government contractor defense, as set forth by *McKay*, there can be no argument that defendants have not met the defense as stated by the court in *In Re Agent Orange*. If the two formulations are different at all, it is that the *Agent Orange* test does not include a determination, as does *McKay*, that the government is immune from liability under the Feres/Stencel doctrine. In fact, it has been held that in reality the *McKay* court merely rephrased the *Agent Orange* test to specifically state what the *Agent Orange* test only implied. *Koutsoubos*, 755 F.2d at 355.

Finally, with regard to the defense as phrased in *Shaw*, it is clear that defendants in the instant case have also met any requirements necessary to the availability of the defense. As the jury specifically found that the Navy required defendants to design a modification to the aircraft and that request resulted in continuous discussions between defendants and the Navy, with the Navy having final approval over the modifications, it is clear that the defendants participated only minimally in the design of the modification, thus meeting the first element of the defense.

However, even if one assumes, *arguendo*, that defendants did not meet the first element, they clearly met the second element, which would also relieve the defendants of liability. The second element requires that the manufacturer

timely warn the military of risks of which they are reasonably aware and of alternative designs which are reasonably known by the contractor, and even though forewarned, the government authorizes the contractor to proceed with the design. *Shaw*, 778 F.2d at 746.

The fulfillment of this element by defendants was conclusively determined by the jury in the trial court below. Therein, the jury specifically determined that the contractor did not fail to notify the Navy of any dangers created by the design specifications which were reasonably known by defendants but not known by the Navy. Further, it was determined that the Navy, informed of all information known by defendants, reviewed and approved the Buick Hood modification. Thus, irrespective of whether it be determined that the defendants have satisfied the first element of this defense, it is manifestly apparent that they have complied with the second. It is therefore clear that there is no need for this Court to review the instant case, as the decision reached below would remain the same regardless of which formulation of the defense is ultimately applied to the facts of the case.

Petitioners also contend that the holding in the instant case is in conflict with decisions in the Third, Fifth, Seventh and Ninth Circuits insofar as the court in the instant case held that the government contractor defense applied to negligence as well as strict liability claims.

The first case to comprehensively analyze the elements and rationale of the government contractor defense in a military context was the *In Re Agent Orange* decision. Therein, defendants contended that they should not be held responsible for injuries arising from the government's use of Agent Orange during the Vietnam War since defendants had manufactured the chemical under contract with the

government and in compliance with its specifications. The court therein emphatically refused to distinguish between negligence and strict liability for purposes of applying the government contractor defense.

The court in *Agent Orange* firmly rejected plaintiff's contention that any involvement by the contractor in setting the specifications should defeat the defense. The court held that "all that is necessary on this element of the defense is for the defendant to prove that the product it supplied was a particular product specified by the government." *In Re Agent Orange*, 534 F.Supp. at 1056. Thus, the *Agent Orange* court would shield a contractor from liability even though the contractor participated in the allegedly negligent design.

Petitioners also argue that since the *McKay* court applied the government contractor defense to a strict liability cause of action, it is uncertain whether the Ninth Circuit intended that a defendant who is found to have breached a duty of due care causing a death or injury should be immune from liability for its negligent conduct. However, the *McKay* court did apply the government contractor defense to claims based on negligence as well as strict liability

The court discussed at length the applicability of the government contractor defense to plaintiff's claims under §§ 388 and 389 of the Restatement Second of Torts, for breach of a "duty to test, measure or evaluate the dynamics of the ejection process on the head, helmet and neck of the ejecting crewmen. . . ." *McKay*, 704 F.2d at 453. The court felt that many of the same reasons for applying the defense to strict liability claims also applied when considering these claims based on negligence principles. As the *McKay* court applied the government contractor defense to plaintiff's claims under §§ 388 and 389 of the Restatement, it is clear that said *McKay* court *did intend* that the government

contractor defense apply to both negligence and strict liability claims.

Implying the existence of a conflict with the Seventh Circuit, petitioners cite the decision of *Tillet v. J. I.Case Co.*, 756 F.2d 591 (7th Cir. 1985). In support of their contention petitioners argue that the court's decision did not indicate that the Seventh Circuit would allow a manufacturer to be summarily protected from the consequences of its own negligence. However, in *Tillet*, even though the specifications were later approved by the government, it was the defendant that deviated from the initial specifications provided by the government. The court then held that the reasoning in *McKay* would apply equally well to design defect cases based on negligence and/or breach of warranty. Thus, it is clear that any conflict between the Seventh and Fourth Circuits in applying the government contractor defense to negligent design defects as well as strict liability claims is indeed illusory.

Further, the petitioners have alleged that the application of *McKay* in the Third and Fifth Circuit Court decisions is uncertain, and in conflict with the holding in the instant case. It is petitioners' contention that these Circuit Courts have not yet applied the government contractor defense to a manufacturer who had a significant role in the origination and development of designs and specifications. However, in the latest decision reached by the Third Circuit, *In Re Air crash Disaster at Mannheim, Germany*, 769 F.2d 115 (3d Cir. 1985), *cert. denied*, ___ U.S. ___, 106 Sup.Ct. 851 (1986), the court agreed with the earlier Third Circuit case of *Koutsoubos*, 755 F.2d at 352, and held that the government contractor defense is available to a contractor that participates in the design of the product, so long as the government's approval consists of more than a mere

"rubber stamp". Such was also the holding in a recent Fifth Circuit case, *Bynum v. F.M.C.*, 770 F.2d at 556, which required genuine government participation in the design before the defense would be available.

Rather than disagree with these decisions, the court in the instant case relied on these decisions to help establish what was required in order to prove that the government had established reasonably precise specifications for the allegedly defective military equipment. In fact, the Third Circuit Court in *Koutsoubos* noted that the district court found a "*continuous back and forth relationship* between Boeing and the Navy with the *Navy always, expectedly and properly, having the responsibility for and exercising responsibility for making final decisions as to the specifications.*" *Koutsoubos*, 755 F.2d at 355. (Emphasis added). The court in *Koutsoubos* determined that this was sufficient evidence to establish that the government's participation in the design was more than a mere "rubber stamp".

This very same finding was also reached by the Fourth Circuit in the instant case, which held that the continuous discussions between defendants and the Navy and the Navy's responsibility for making the final decisions was sufficient to invoke the government contractor defense. It is therefore difficult to envision the conflict that petitioners have alleged exists between the Third, Fourth and Fifth Circuit Courts.

Finally, as already stated, the Eleventh Circuit in *Shaw* made absolutely no distinction between the application of a government contractor defense to claims for strict liability, negligence or breach of warranty. As such, it is apparent that the conflict petitioners have alleged to exist between the Circuit Court decisions with regard to the application of

the government contractor defense to claims of negligence is purely illusory.

CONCLUSION

For all the reasons set forth above, the respondent herein submits that plaintiffs' petition for a writ of certiorari should be denied by this honorable court.

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